

THE MARK O. HATFIELD

COURTHOUSE NEWS

A Summary of Topical Highlights from decisions of the
U.S. District Court for the District of Oregon
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The Ninth Circuit Jury Instructions Committee has completed an extensive revision of the *Ninth Circuit Manual of Model Civil Jury Instructions*. This edition contains a substantial revision and reorganization of many chapters. For example, former Chapters 1-5 have been reorganized as three chapters: Chapter 1 ("Instructions on the Trial Process"), Chapter 2 ("Instructions on Types of Evidence"), and Chapter 3 ("Instructions on Deliberations"). Chapter 9 ("Civil Rights Actions-42 U.S.C. § 1983") and Chapter 10 ("Civil Rights-Title VII Employment Discrimination; Harassment; Retaliation") have been revised and expanded. The 2007 edition supersedes all previous editions.

The revised instructions have been submitted to West Publishing Company for publication. However, West estimates that publication will not be complete for approximately two months.

In order to facilitate the immediate availability of the revised instructions, the instructions are now available online at the Ninth Circuit's Internet website at this direct

link:
<http://www.ce9.uscourts.gov/web/sdocuments.nsf/civ>
<http://www.ce9.uscourts.gov>.

USERRA

Plaintiff brought an action for violation of the Uniformed Services Employment and Reemployment Rights Act (USERRA), 38 U.S.C. § 4301, et seq., and for common-law wrongful discharge. Plaintiff claimed animus related to his military leave was a motivating factor in three separate adverse-employment actions. Defendant moved for summary judgment as to both claims. Judge Brown denied defendant's motion. The Court concluded the record contained sufficient evidence to withstand summary judgment on two of plaintiff's theories: that he was demoted and later terminated in violation of USERRA. The Court also denied defendant's motion as to plaintiff's common-law wrongful-discharge claim. The Court rejected defendant's arguments that USERRA's remedies for lost wages and benefits and possible liquidated damages would provide an adequate statutory remedy for plaintiff's alleged injuries.
Patton v. Target Corp.,

CV 03-1722-BR
(Opinion March 21, 2007).
Plaintiff's Counsel: Mark A. Turner
Defense Counsel: Michael A. Griffin.

Relation-back Rules

Judge Panter ruled that the relation-back principles of Fed. R. Civ. P. 15(c) apply to decide whether plaintiff's 42 U.S.C. § 1983 claims are time-barred. The court rejected defendants' contention that this question is controlled by state law and by Oregon Rule of Civil Procedure 23C.
Phillips v. Multnomah Co.
CV 05-105-CL
(Opinion, 3/23/07)
Plaintiff's Counsel: Michelle Burrows
Defense Counsel: Michelle Bellia

Employment

Plaintiff brought a First Amendment retaliation claim against the County and her supervisor, an Oregon statutory whistleblower claim against the County, and a common law wrongful discharge claim against the County. On summary judgment, plaintiff conceded the wrongful discharge claim. Judge Hubel granted summary

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judgment to defendants on the remaining claims. On the First Amendment claim against the County, Judge Hubel concluded that plaintiff failed to create an issue of fact regarding any policy, practice, or custom by the County, and failed to show that the termination decision was made by a policymaking official or ratified by a policymaking official. As to the First Amendment claim against the supervisor, Judge Hubel analyzed the recent Supreme Court decision of Garcetti v. Ceballos, 126 S. Ct. 1951 (2006), which requires the court to examine whether a statement made by a public employee was made as a citizen or pursuant to the employee's job duties. In this case, Judge Hubel concluded that the speech at issue was not protected by the First Amendment under Garcetti because the plaintiff, as a budget and financial manager with the County, spoke pursuant to her job duties in raising issues about alleged fiscal mismanagement at the County.

Judge Hubel also granted summary judgment to the County on the state whistleblower claim, concluding that there was no "disclosure" as that term is used in the statute because plaintiff's statements did not disclose any information not previously known.

Clarke v. Multnomah Co.,
CV 06-229-HU
(Opinion, 3/23/07)
Plaintiff's Counsel:
Elizabeth Farrell
Defendants' Counsel:

Kathryn Short

Employment

Judge Aiken granted in part and denied in part defendant's motion for summary judgment in this diversity tort case. The court granted defendant's motion for summary judgment and dismissed plaintiff's claims for intentional infliction of emotional distress and false imprisonment. The court denied defendant's summary judgment motion as to plaintiff's claim for fraud. Asay v. Albertsons, Inc.
CV 06-6017-AA
(Opinion, 4/27/07)
Plaintiff's Counsel:
Claud Ingram
Defense Counsel:
Kenneth J. Diamond

Lanham Act

Plaintiff CollegeNET brought this action against its competitor, Defendant XAP Corporation, for infringement of CollegeNET's patented online processing system of student-college applications and for violation of § 43(a) of the Lanham Act contending XAP engaged in unfair competition by making false representations to its customers regarding confidential information provided by students who use the XAP System when they apply for college.

During a jury trial in 2006, the jury was asked to determine the patent-infringement claims (including various invalidity defenses), and to decide whether XAP engaged in unfair competition under the Lanham Act and, if so, to assess subject to the

Court's direction the amount of actual damages that CollegeNET sustained.

The jury found in plaintiff's favor on the Lanham Act claim and awarded actual damages of \$4.5 million. The jury also found defendant infringed one of plaintiff's patent claims. The Court reserved for a later court trial the equitable issues relating to Plaintiff's Lanham Act claim, including defendant's laches affirmative defense and plaintiff's claims for enhanced damages, disgorgement of defendant's profits, and attorneys' fees.

On January 24 and 25, 2007, at the court trial, the Court concluded plaintiff's Lanham Act claim was timely filed. The Court also concluded the jury award of actual damages could be adopted or enhanced but not decreased.

Based on these standards, the Court found by clear and convincing evidence that Defendant's conduct giving rise to the Lanham Act claim was willful, but the Court declined to award enhanced actual damages or disgorgement of Defendant's profits. CollegeNET Inc. v. XAP Corp., CV 03-1229-BR (Verdict and Findings of Fact/Conclusions of Law, March 26, 2007)
Plaintiff's Counsel:
Arthur Beeman
Defense Counsel: Lynn H. Pasahow

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